Supreme Court, U.S.
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No. 92-1910

In the Supreme Court of the United States

OCTOBER TERM, 1993

MARIANO LETTIERI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

LOUIS M. FISCHER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTIONS PRESENTED

1. Whether petitioner was deprived of a fair trial by prosecutorial misconduct.

2. Whether hearsay evidence was properly introduced at petitioner's sentencing hearing.

3. Whether petitioner's lawyers provided effective assistance of counsel.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A29) is reported at 983 F.2d 1443.

JURISDICTION

The judgment of the court of appeals (Pet. App. A30) was entered on January 21, 1993. A petition for rehearing was denied on February 26, 1993. Pet. App. B1. The petition for a writ of certiorari was filed on May 27, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of conspiring to distribute heroin and cocaine and to possess those substances with the intent to distribute them, in violation of 21 U.S.C. 846. He was sentenced to 190 months in prison, to be followed by five years of supervised release. Pet. App. C1-C4. The court of appeals affirmed. Pet. App. A1-A29.

1. The evidence at trial, the sufficiency of which is not in dispute, showed that petitioner was part of a drug distribution network in Chicago. From late 1987 through April 1989, co-defendant Nedrick Miller, a Chicago police officer, ran a drug distribution operation from an apartment building that he managed. Miller received a weekly payment for allowing co-defendant Michael Gomire to sell and process cocaine in the building. Petitioner sometimes supplied them with cocaine and heroin. During the summer of 1988, the three men agreed to participate in consignment sales of kilogram quantities of cocaine furnished by petitioner. Gomire and Miller sold three to four kilograms for petitioner. Each kilogram sold netted approximately $42,000, of which petitioner's share was $29,000. Pet. App. A2-A3.

2. At sentencing, a Drug Enforcement Agency agent testified that Miller admitted that he had obtained 36 kilograms of cocaine from petitioner during the course of the conspiracy. The district court credited this testimony, finding it consistent with the evidence at trial. The court increased petitioner's offense level under the Sentencing Guidelines to 38 to reflect his involvement in the

distribution of 36 kilograms of cocaine. Pet. App. A29; Gov't C.A. Br. 3.

After sentencing, petitioner moved for a new trial because Gomire recanted his testimony in a sworn affidavit given while he was in the Cook County Jail. At a subsequent hearing after Gomire had been transferred to federal custody, Gomire retracted his recantation and reaffirmed that his trial testimony was truthful. Gomire explained that he had recanted his testimony because he had been beaten and threatened by other inmates in the Cook County Jail. He also testified that he had received money orders as inducements to recant his testimony. The district court denied petitioner's motion for a new trial, finding that Gomire's affidavit was false and that his trial testimony was truthful. Pet. App. A5-A6; Gov't C.A. Br. 16-17.

3. a. On appeal, petitioner argued that he had been denied a fair trial as a result of prosecutorial misconduct. Petitioner alleged that the prosecutor improperly cross-examined him about a misdemeanor conviction for theft that was more than ten years old. The court of appeals noted that although petitioner filed a pretrial motion to exclude questioning about that conviction, the trial court never ruled on that motion, and petitioner did not make a contemporaneous objection at trial. Pet. App. A15-A17. The court found that the prosecutor's questions about the prior conviction for a crime of dishonesty were proper to impeach petitioner's credibility and that the questioning did not deny petitioner a fair trial. *Id.* at A17-A18.

Petitioner also contended that the prosecutor vouched for the testimony of Howard Lucas, a participant in the drug distribution ring. The court of appeals determined that the prosecutor had

properly questioned Lucas about his plea agreement and merely referred to that testimony in closing argument. Pet. App. A20. The court also found that the prosecutor had "neither insinuated that he possessed knowledge outside the record, nor injected his personal beliefs about Lucas' veracity." *Ibid.*

Petitioner further claimed that the prosecutor acted improperly by asking him about a photograph of the boiler room in petitioner's butcher shop where Lucas claimed to have picked up heroin. During cross-examination, the prosecutor asked petitioner if he would mind leaving the witness stand and getting a photograph of the room. Upon defense counsel's objection, the trial judge immediately instructed the jury to disregard the exchange. The court of appeals held that the prosecutor's conduct, while improper, did not warrant reversal because the trial court gave a curative instruction and petitioner had an opportunity to counter the effect of that question during redirect examination and in closing argument. The court of appeals therefore found that the conduct "was not so improper that the fairness of the trial was fundamentally flawed." Pet. App. A21.[1] The court of appeals also determined that the alleged instances of prosecutorial misconduct, considered cumulatively, did not entitle petitioner to relief. *Id.* at A23.

b. Petitioner argued that his sentence was based on co-defendant Miller's out-of-court statement that

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[1] The prosecutor brought up the boiler room again in his summation, asking why petitioner did not produce a photograph of the room to challenge Lucas's testimony. Because petitioner had not objected to that remark, the court of appeals evaluated the claim of error under the plain-error standard. Applying that standard, the court held that petitioner had not been denied a fair trial. Pet. App. A21-A22.

petitioner supplied him with 36 kilograms of cocaine. Petitioner argued that his right to confront Miller was denied by Miller's failure to appear at sentencing. The court of appeals held that reliable hearsay may be considered at sentencing and that Miller's proffer was consistent with the trial testimony in this case. Pet. App. A28-A29.[2]

ARGUMENT

1. Petitioner contends (Pet. 12-22) that he was denied a fair trial because of prosecutorial misconduct. Specifically, petitioner argues (Pet. 18) that the court of appeals did not determine that he received a fair trial and applied an erroneous standard in rejecting his claims of prosecutorial misconduct. Neither contention is correct.

When a prosecutor has engaged in misconduct, a reviewing court must evaluate any harm caused by the prosecutor's improper remark in light of the entire trial record, any curative steps taken by the trial court, and the weight of the evidence against the defendant. See, *e.g.*, *United States* v. *Dougherty*, 810 F.2d 763, 767-768 (8th Cir. 1987); *United States* v. *Rodriguez*, 765 F.2d 1546, 1560 (11th Cir. 1985). Consistent with that framework, the court of appeals in this case carefully considered each of petitioner's claims of prosecutorial misconduct and determined that petitioner had not been denied a fair trial. For example, the court of appeals properly held that

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[2] The court of appeals also rejected petitioner's claim that his trial lawyers deprived him of effective assistance of counsel by engaging in a "no objection" policy at trial. The court found instead that defense counsel had filed numerous motions in limine and had made many objections at trial. Pet. App. A28.

curative instructions were sufficient to cure the effect of the prosecutor's request that petitioner produce a photograph of his boiler room (where a cohort claimed to have picked up heroin) and the prosecutor's closing remark that the jury should send a message by convicting petitioner. Pet. App. A21-A23.[3]

In several instances, moreover, petitioner's counsel did not contemporaneously object to alleged prosecutorial misconduct, and the court of appeals evaluated those claims for plain error. Fed. R. Crim. P. 52(b). The plain-error standard requires reversal only when a claim forfeited at trial "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *United States* v. *Olano*, 113 S. Ct. 1770, 1779 (1993). Under that standard, the court of appeals was correct in finding that the prosecutor's questions concerning petitioner's prior misconduct did not amount to plain error because (A) petitioner had a chance to counter the testimony through redirect examination, calling other witnesses, and argument and (B) the strong weight of the evidence supported petitioner's conviction. Pet. App. A19. The court was also justified in its conclusion that no plain error occurred when the prosecutor referred to petitioner's defense as "contrived." *Id.* at A22.[4] Finally, the court

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[3] In context, moreover, the prosecutor's statement to the jury to "send a message" was not an invitation to disregard the law. Just prior to making that remark, the prosecutor had told the jury that everyone must be answerable to the law. Thus, the challenged statement was properly understood as telling the jury to send a message by holding petitioner to the standards of the law. See Gov't C.A. Br. 24-25.

[4] The court of appeals also properly rejected petitioner's claim relating to the prosecutor's reference to the boiler room during his closing argument. Pet. App. A21. Because peti-

also correctly found (*id.* at A20) that there was no prosecutorial misconduct, much less plain error, when the prosecutor elicited the terms of a government witness's plea agreement and referred back to that testimony in closing argument. See, *e.g.*, *United States* v. *Walker*, 871 F.2d 1298, 1303 (6th Cir. 1989); *United States* v. *Creamer*, 555 F.2d 612, 617 (7th Cir.), cert. denied, 434 U.S. 833 (1977).[5] Petitioner's fact-intensive claims to the contrary do not warrant further review.

Finally, petitioner claims that the court of appeals erred in evaluating the alleged prosecutorial misconduct by asking "whether the outcome of the trial would be different in the absence of the prosecutor's misconduct." Pet. App. A23 (citing *Solles* v. *Israel*, 868 F.2d 242, 248 (7th Cir.), cert. denied, 490 U.S. 1101 (1989)). Contrary to petitioner's argument, the court of appeals properly evaluated individual instances of alleged misconduct in terms of whether petitioner received a fair trial. See Pet. App. A18-A23. The court emphasized, moreover, that the evidence

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tioner did not contemporaneously object to that reference, the court evaluated the claim for plain error. Finding that the error was not egregious and that the evidence against petitioner was strong, the court determined that the prosecutor's remark had not denied petitioner a fair trial. *Id.* at A22.

[5] Petitioner errs in relying (Pet. 20-21) on *United States* v. *Smith*, 962 F.2d 923 (9th Cir. 1992). There, the court of appeals held that plain error resulted when the prosecutor vouched for a government witness and repeatedly staked the government's and court's prestige on the veracity of the testimony presented. *Id.* at 933-936. In contrast, the court in this case found that the prosecutor had not vouched for Lucas's veracity, but merely referred to Lucas's properly admitted testimony that he was required to tell the truth or face perjury charges. Pet. App. A20.

against petitioner was "strong." See *id.* at A19. After concluding that none of the specific instances of misconduct deprived petitioner of a fair trial, the court then determined that their cumulative effect was not sufficiently great that "the jury would have returned a different verdict absent such conduct." *Id.* at A23. The court of appeals' analysis is therefore not contrary to this Court's holding in *Berger* v. *United States*, 295 U.S. 78, 88-89 (1935), that prosecutorial misconduct requires reversal where the evidence against the defendant "[is] not strong" and the cumulative effect of the prosecutor's misconduct "cannot be disregarded as inconsequential."

2. Petitioner contends (Pet. 23-24) that the district court sentenced him on the basis of unreliable hearsay statements from co-defendant Miller about the quantity of cocaine petitioner contributed to the scheme. The courts of appeals have held that hearsay is admissible at sentencing if it is reliable. See, *e.g.*, *United States* v. *Aymelek*, 926 F.2d 64, 68 (1st Cir. 1991); *United States* v. *Byrd*, 898 F.2d 450, 452-453 (5th Cir. 1990). Petitioner does not contest (Pet. 23) that principle, but contends that the district court in this case failed to determine the accuracy of the hearsay introduced. The district court, however, found that Miller's information "dovetail[ed] with a lot of the testimony at trial." Gov't C.A. Br. 43. The court of appeals, moreover, found that Miller's testimony that petitioner supplied 36 kilograms of cocaine to the scheme was not contradicted by the trial record. Pet. App. A29.

3. Petitioner claims (Pet. 25-27) that his attorneys rendered ineffective assistance of counsel by failing to object to certain evidence and arguments at trial. To demonstrate ineffective assistance of counsel, a

defendant must satisfy two requirements. First, he must demonstrate that his attorney's performance was constitutionally deficient—that is, that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984). Second, a defendant must establish prejudice by showing that his counsel's errors were so serious that they denied him a fair trial. *Ibid.*

Petitioner alleges ineffective assistance of counsel because his lawyers failed to object to (1) Annette Daggs' hearsay testimony that Miller told her that certain cash in his possession was for petitioner; (2) Gomire's hearsay testimony that Miller told him that petitioner had supplied Miller with cocaine; (3) the prosecutor's cross-examination of petitioner concerning prior acts of theft, drug dealing, and dealing in stolen goods; and (4) the alleged prosecutorial misconduct relating to the boiler room photograph and to comments upon petitioner's defense.

Because Daggs and Gomire were part of the conspiracy, and Miller's statements were made in furtherance of that conspiracy (see Gov't C.A. Br. 39-40), those statements were admissible under the co-conspirator exception to the hearsay rule. Further, petitioner's attorneys did not render constitutionally deficient services when they failed to object to the government's cross-examination about petitioner's prior acts of theft and dealing in stolen property. Because such acts reflect on petitioner's honesty (see Fed. R. Evid. 608(b)), counsel may reasonably have believed that an objection would be unsuccessful and would simply highlight the evidence for the jury.

As to the other matters cited by petitioner, even if we assume arguendo that his trial counsel acted unreasonably in failing to make certain objections, petitioner has not demonstrated a "reasonable probability" that the jury would have had a reasonable doubt in the absence of those errors. *Strickland*, 466 U.S. at 695.[6] In fact, the court of appeals determined that the instances of prosecutorial misconduct cited by petitioner, including the conduct to which trial counsel failed to object, did not affect the verdict. Pet. App. A23. Petitioner therefore has not shown that he is eligible for relief under *Strickland*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

LOUIS M. FISCHER
Attorney

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[6] The prosecutor's reference to petitioner's "contrived defense" is better understood as a characterization of the evidence at trial than a statement of the prosecutor's personal opinion. Furthermore, the court of appeals found that the reference to the boiler room in closing argument was not "egregious," particularly in light of the strength of the evidence against petitioner. Pet. App. A22.